No. 2745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
a Corporation,
Plaintiff in Error,
vs.
FRANK R. STEWART,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

HAYES & LANEY,
Attorneys for Defendant
in Error.

THE MO NEIL COMPANY, PHOENIX, ARIZONA

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In our reply to the brief of plaintiff in error filed herein, we shall for brevity pass over plaintiff in error's statement of the case and its assignments of errors, taking up those assignments in the order and in the form in which they appear in the arguments, beginning on Page 28 of the brief, and should we have occasion to call the Court's attention to additions or corrections of any portion of the statement or of the assignments, we shall do so in the course of our reply to the arguments and under each separately enumerated argument in the order in which it is stated in plaintiff's brief.

REPLY TO ARGUMENT NUMBERED FIRST, EMBRACING FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR.

These assignments relate to questions propounded by plaintiff in error and objected to by defendant in error, through which it sought to establish a custom of the plaintiff in error, and perhaps of other carriers in the southwest, of maintaining stock pens and corrals upon its line of railroad, similar to the feeding and rest pens complained of by the defendant in error. The plaintiff in error doubtless assumes that if it were permitted to show that the feeding and rest pens at Yuma, Arizona, were maintained in as good condition as were such pens and corrals at El Paso, Texas, Tucson, Bowie and Phoenix, Arizona, Indio, California, and other places in the southwest, this fact would present proper and material evidence for the jury's consideration in arriving at their determination as to whether the plaintiff in error had been negligent in maintaining improperly equipped pens at Yuma, Arizona.

Before such questions as embodied in these assignments of error could be relevant or material testimony, it would first have to be established that the pens at the places suggested for comparison were properly equipped. The questions as propounded have the further vice of implying or leaving the inference with the jury, without proof, that such places offered for comparison were properly equipped and maintained. The question suggested in the third assignment of error is further objectionable in that the question itself assumes, without proof, that the places

therein referred to are similarly situated and have the same climatic conditions as Yuma, Arizona. If the plaintiff in error was negligent in maintaining its pens at Yuma in the condition complained of, that negligence could not be condoned or excused by establishing a negligent custom. A negligent custom cannot excuse or condone a particular negligent act.

The following cases appear to be in point, and seem to us to establish conclusively that the court acted properly in sustaining the objections of defendant in error to the questions assigned as error by the plaintiff:

> Grand Trunk R. Co. vs. Richardson, 91 U. S. 454, 469.

Quoting from the decision:

> "The second assignment of error is that the Court excluded testimony offered by the defendant to show that the usual practice of railroad companies in that section of the country was not to employ watchmen for bridges like the one destroyed. It is impossible for us to see any reason why such evidence should have been admitted. The issue to be determined was, whether the defendant had been guilty of negligence; that is whether it had failed to exercise that caution and diligence which the circumstances demanded and which prudent men ordinarily exercise. Hence the standard by which its conduct was to be measured was not the conduct of other railroad companies in the vicinity; certainly not their usual conduct. * * * The usual practice of other companies in that section of the country sheds no light upon the duty of the defendant when running locomotives over long wooden

bridges in near proximity to frame buildings when danger was more than commonly imminent."

In Hibbler vs. McCartney, 31 Ala. 501, it was expressly held that usage and custom will not excuse a carrier for neglect of any duty which it owes to transport goods safely.

Champagne vs. Patterson, 50 Ill. 61 was an action against a city for an injury to a pedestrian caused by an opening in the sidewalk. In this case it was held that the existence of similar apertures in various other parts of the city for a long period did not show that the alleged defect was not one for which the city was liable if any damage was occasioned thereby.

Hinkley vs. Barnstable, 109 Mass. 126, was an action against a town for an injury received by reason of an uncovered drain. The defendant sought to show absence of negligence on its part by offering evidence that it was usual for towns in that part of the country to leave drains uncovered. The evidence so offered was excluded by the Court.

In Bailey vs. New Haven etc. R. R. Co., 107 Mass. 496, the defendant was charged with negligence in failing to maintain a flagman at a crossing, held that the custom of other railroads in maintaining flagmen at crossings was inadmissible.

REPLY TO ARGUMENT NUMBERED SECOND, EMBRACING ASSIGNMENT OF ERROR NUMBERED FIVE.

This argument is upon plaintiff in error's motion for a directed verdict, and is based primarily upon the Act

referred to therein, being the Act approved June 29, 1906, 34 Stat. L. 607.

Counsel at the outset appear to have overlooked the gist of defendant in error's cause of action. Our action is not based upon the delayed transportation of the stock, but upon the duty of the plaintiff in error to transport the cattle safely and to deliver them in good condition at destination, and their negligent performance of this duty in unloading the cattle at 9:00 o'clock in the morning of the 4th day of July, at the station of Yuma, Arizona, into improperly equipped feed and rest pens. See defendant in error's complaint (Trans. pp. 1-6 inclusive).

Upon reading the defendant in error's pleadings, it will be readily apparent that the gist of his cause of action is not the delay in transportation caused by compliance with that Act, but the negligent compliance with that Act. The compliance with the Act in such manner as to directly inflict cruelty upon the animals in question, rather than to prevent cruelty to them, which is one of the main purposes of the Act. The Act provides for the unloading of animals "in a humane manner into properly equipped pens for rest, water and feeding."

The Act has a two fold purpose, first to insure humane treatment of animals in transit, and second. to subserve the interests of the owner or shipper as far as possible in consonance with such treatment.

U. S. vs. Ore. Ry. etc. Co., 163 Fed. 640.
U. S. vs. Atchison etc. Ry. Co. 166 Fed. 160, 163.
U. S. vs. So. Pac. Co. 157 Fed. 459.

The Plaintiff in error so handled this shipment at Yuma as to neither insure humane treatment of the animals, nor subserve the interests of the shipper, but in direct and willful violation of the expressed wishes of the shipper and his associates, three experienced cattlemen, and despite their repeated warnings that to do the thing complained of would result in the serious injury or death of the cattle, thereby violating both the spirit and intent of the Act. (Trans. pp, 83, 90, 98 and 99).

The Court properly refused plaintiff in error's motion for a directed verdict for the further reasons:

(1) That there was testimony introduced on behalf of the defendant in error, to the effect that the shipment was loaded at Los Angeles at 4:40 P. M. on the 3rd, and arrived at Yuma at 9:00 A. M. on the 4th, after having been confined for a period of sixteen hours and twenty minutes. This testimony having been rebutted by plaintiff in error. The actual period of confinement of the cattle at the time of their arrival at Yuma was a material issue of fact for the jury.

(2) That the cattle were shipped in open, properly ventilated cars which would protect them from the rays of the sun and at the same time afford free passage of air through the cars, and that they arrived at Yuma in good condition, "all standing quietly and nice and perfectly cool." "Cattle never shipped finer." (Trans. pp. 90, 98, 100). This testimony is undisputed.

(3) That upon arrival at Yuma, the weather was very hot, and the stock pens consisted of sand dunes enclosed by fence, with no shade of any character.

(Trans. pp. 83, 90 and 100). This testimony is undisputed.

(4) That upon arrival of the shipment at Yuma, the plaintiff in error's attention was called to the then good condition of the shipment, that arrangements had been made for forwarding the shipment through to Phoenix. That to unload the cattle at Yuma under the conditions then existing, would result in the death of "every head of cattle." (Trans. pp. 83, 90 and 99). This testimony is undisputed.

(5) That the defendant in error delivered to the plaintiff in error at Yuma, a telegram showing arrangements made at Phoenix for the through transportation of his shipment; that in addition thereto he offered to sign and deliver to plaintiff in error, a release of all liability for forwarding the shipment. (Trans. pp 89, 90, 99, 105 and 106.) This testimony is undisputed.

(6) That the plaintiff in error had feed and rest pens at Gila, at which point the cattle could probably have been unloaded within the twenty-eight hour period, as the train upon which the shipment was handled, did actually arrived at Gila within the twenty-eight hour period (Trans. p. 119). That the cattle without doubt could have been moved to Gila and in all probability to their destination at Phoenix, Arizona, within the thirty-six hour period under the special telegraphic arrangement had with the Arizona Eastern at Phoenix.

We believe the Court erred in failing to instruct the jury that the conduct of the defendant in error in delivering the telegram to the agent at Yuma and in

further offering to sign a release in writing to the plaintiff in error, amounted to the tender to it of a release in writing in accordance with the provisions of the so-called Twenty-eight Hour Act (Trans. pp. 89, 90, 99, 104, 105 and 106), and although the defendant in error duly excepted to the action of the Court in failing to so instruct the jury, this fact is not urged at this time except as an answer to plaintiff in error's assignments and to call the Court's attention to the facts as developed by the testimony.

(7). That the damage sustained by defendant in error was the direct and proximate result of the negligent acts of the plaintiff in error as hereinabove set forth. That defendant in error's damage was not due to a climatic condition over which the plaintiff in error had no control is conclusively shown we believe, by the undisputed testimony that the cattle arrived at Yuma in good condition, and it is to be presumed that had the shipment moved forward in keeping with the shipper's instructions, the protection accorded the cattle by the cars together with the circulation of air and breeze created by the motion of the train, would have fully protected the cattle from injury. Had the cattle succumbed to heat while in transit in the plaintiff in error's cars and without any negligence upon the part of the plaintiff in error, this would have been a loss due to natural causes, but where the loss was occasioned as in this case through an intervening negligent act on the part of the plaintiff in error as the proximate cause of the injury and damage, it cannot be successfully maintained that the damage was due to causes beyond the control of the plaintiff in error. An examination of the cases cited by plaintiff in error

to the effect that the loss was due to climatic conditions, will disclose that in no single instance was there an intervening negligent act contributing to or proximately causing the injury and damage.

REPLY TO ARGUMENT NUMBERED THIRD, EMBRACING THE SIXTH ASSIGNMENT OF ERROR.

We believe the requested instruction was properly refused for the reason that the evidence discloses the tender of the thirty-six hour release; that the cattle could have been forwarded to their destination at Phoenix within the thirtysix hour period; and that in any event, the cattle could have been forwarded to Gila within the twenty-eight hour period, at which station the cattle could have been unloaded in the evening and in a more humane manner than under the conditions then existing at the station of Yuma. The Court doubtless based his refusal to give this instruction upon the fact that there was testimony in the record that the shipment could have been forwarded to Gila within the twenty-eight hour period, and that in view of the refusal of the defendant in error to permit the unloading at Yuma and the warnings there given, it was the duty of the plaintiff in error in any event to have moved the shipment to Gila.

REPLY TO ARGUMENT NUMBERED FOURTH, EMBRACING THE SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR.

The Court we believe very properly denied these requested instructions. The instructions embraced contested questions of fact which it was the province

of the jury to determine and which could not properly be assumed in the instruction.

To have granted the instructions would have been an express recognition of the right of the plaintiff in error to control the shipment and would have been tantamount to saying to the jury that the shipper himself had no voice or discretion in the handling of his shipment. The instructions place the entire discretion in the matter, with the plaintiff in error and ignore the protests, warnings and demands of the shipper.

The instructions are further erroneous in ignoring the fact in evidence that the cattle could have been transported to the station of Gila, if not in fact to the city of Phoenix under the special arrangement made by the shipper, in compliance with the tendered release in writing to the plaintiff in error. The carrier is bound to subserve the interests and wishes of a shipper with respect to the handling of his shipment so far as possible in consonance with proper treatment of the stock.

REPLY TO ARGUMENT NUMBERED FIFTH, EMBRACING THE NINTH, TWELFTH AND TWENTY - FOURTH ASSIGNMENTS OF ERROR.

The ninth and twelfth assignments complained of are substantially embodied in the instruction given by the Court and excepted to as the Twenty-fourth assignment of error. To place this instruction before the Court conveniently, we here quote it in full:

"The defendant company also pleads that not-

withstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the "second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the Freight Claim Agent of the first party in writing within ten days after unloading the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employes within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover unless you further find that the defendant waived this provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff in reply to this contention, that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above quoted provision in that "on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at.....Yuma—(I say subsequent to the arrival of said cattle at Yuma)— the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint, that said cattle were unloaded by the defendant into its stock pens at the station of Yuma between the

hours of 9 and 10 o'clock A. M. on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of the said cows died . . . That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any other person else in the exercise of due care and diligence to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of such injuries . . . that the defendant had on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said

complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff." I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

"I charge you as a matter of law that if you believe the defendant or its agents or employes did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts."

The facts as pleaded by the defendant in error and embodied in the foregoing instruction were completely sustained by proof introduced by defendant in error and undisputed and uncontradicted by plaintiff in error. (Trans. pp. 83, 84, 85 and 86).

We believe this instruction states correctly and completely, the law relative to the giving of notice in writing of claim for damages and relative to waiver of such notice, and cite the following cases in support of the instruction:

Cockrill vs. M. K. & T. Ry. 136 Pac. 322.

Wabash Ry. Co. vs. Thomas, L. R. A. (N. S.) 1041.

Adams vs. Colo. & So. Ry. Co. 113 Pac. 1010.

Pierson et. al. vs. No. Pac. Ry. Co. 112 Pac. 509.

Chicago & Rock Island Ry. Co. vs. Spears, 122 Pac. 228.

Mo. K. & T. Ry. Co. vs. Frogley, 89 Pac. 903.

REPLY TO ARGUMENT NUMBERED SIXTH, EMBRACING THE FIFTEENTH ASSIGNMENT OF ERROR.

This instruction was properly refused by the Court for the reason that it sought to confine the issues made by defendant in error in his complaint and reply, within a narrower scope than made by his pleadings and proof, and is not sufficiently specific to embrace any particular matter of defense pleaded by plaintiff in error. The following instruction given by the Court sufficiently meets the arguments of counsel in support of this assignment and completely embraces and covers the several matters of defense urged in their argument:

> "In order to enable you to determine whether or not the negligence of the defendant above referred to caused the death of or injury to any of the cows, you may also take into consideration all evidence with reference to the previous history and condition of the said cows, the climatic conditions where they were raised and shipped from, their physical condition at the time of shipment, whether or not they had been well cared for and fed in Los Angeles, California, previous to such shipment, the condition of the weather with respect to temperature at the time they were shipped from Los Angeles and at the time they arrived at Yuma, the condition of the cattle when they arrived at Yuma before they were there unloaded, their ages and weights, the condition of their health and strength, and all other facts and

circumstances of the trip surrounding and in any way affecting the class and condition of said cattle." (Trans. 165).

In view of this instruction having been given, the giving of plaintiff in error's requested instruction, had it been correctly stated, would have been more repetition, and therefore unnecessary.

REPLY TO ARGUMENT NUMBERED SEVENTH, EMBRACING THE SEVENTEENTH AND NINETEENTH ASSIGNMENTS OF ERROR.

These instructions were properly refused for the reasons set forth in the concluding portion of our reply to plaintiff in error's argument numbered Second, and for the further reason that there is evidence on the part of the defendant in error and uncontradicted by the plaintiff in error tending to establish the fact that the negligence of the plaintiff in error in unloading the shipment at Yuma under the conditions then prevailing at Yuma and into the improperly equipped feeding and rest pens then being maintained at that point, was the direct and proximate cause of the injury to defendant in error's cattle and his resulting damage.

The instruction requested under assignment numbered Seventeen was further objectionable in that there was no testimony whatsoever introduced by the plaintiff in error showing or tending to show that any of the loss or damage to the shipment was due to climatic conditions solely and independently of any act of negligence on the part of the plaintiff in error.

The instruction refused and assigned as error num-

bered Nineteen was also further objectionable in that it did not negative negligence on the part of the plaintiff in error as a contributing or proximate cause of defendant in error's damage and loss .

REPLY TO ARGUMENT NUMBERED EIGHTH EMBRACING THE EIGHTEENTH ASSIGNMENT OF ERROR.

It is true that in the contract of shipment, the defendant agreed to unload and reload at resting places and to feed and water at his own expense and to accompany and attend his livestock enroute and at its destination. The contract further provided:

> "And in case first party should through his employes furnish aid to assist in loading, caring for enroute, unloading or transferring said livestock said employes of first party so assisting or performing services shall be subject to the orders and deemed the employes of second party while so engaged, and not in any sense the agents of first party; and when livestock is in corrals at shipping point, resting place or destination, it shall be at owner's risk of loss or damage through breaking out of corrals or in loading and unloading."

The Act of June 29, 1906, commonly known as the Twenty-eight Hour Act, places upon the carrier the duty of feeding, watering and caring for the shipment in the event of the default of the shipper in so doing.

The provisions of the shipping contract above quoted, assume that the carrier has in the first in-

stance provided properly equipped feed and rest pens into which the stock may be unloaded, and further that the shipper's reasonable requests relative to a shipment have been complied with, and that a necessary and proper case for unloading exists. The facts developed in this case show that the carrier acted arbitrarily, willfully and without authority from the shipper, in fact contrary to the repeated warnings and vigorous protests of the shipper; that upon the refusal of the shipper to unload his stock under the conditions testified to, the carrier assumed the responsibility of unloading and caring for them and of course the risk attendant upon and following as the natural result of its conduct in so doing.

The damage to defendant in error's shipment was not the direct or proximate result of the failure to feed and water the shipment, but of the failure of the carrier to provide suitably equipped pens for receiving the shipment, a condition over which the shipper had no control, and for which he could not be compelled to assume the responsibility. The act was committed by the carrier after repeated warnings by three experienced cattlemen, Stewart, Whitton and Ford, and having assumed to act in defiance of the shipper and his caretakers, the carrier cannot now evade the responsibility of his negligent acts by charging the shipper with contributory negligence in failing to procure the Yuma Fire Department to shower his cattle and wet down the carrier's pens during the ten hour period they remained at Yuma.

The case of Gilliland et. al. vs. So. Ry. Co. 67 S. E. 20, is the only case we have been able to find even approximately in point upon the question raised by

counsel in this assignment. This was a case in which the carrier unloaded the stock against the protests of the shipper and in the absence of the shipper, and thereafter attempted to relieve itself from liability by charging the shipper with the duty of unloading, reloading and caring for his shipment as in this case. The Court held as follows:

> "It was the duty of the shipper to load and unload and to supply food, water and attention, but it was the duty of the railroad company to supply a proper place to unload the stock and to have proper protection for them and if the horses and mules were injured because the carrier neglected to have a proper place and proper protection for the unloading, it would be liable for the resulting injury."

REPLY TO ARGUMENT NUMBERED NINTH, EMBRACING THE TWENTY-THIRD ASSIGNMENT OF ERROR.

We believe no reply to plaintiff in error's argument in support of this assignment is necessary further than to here quote for the convenience and instruction of the Court, portions of the trial court's instructions immediately preceding and immediately following the instruction complained of, to enable the Court to see that the instruction was a complete and entirely proper and fair one:

> "I further charge you that it was the duty of the defendant company to unload the cattle for feed, rest and water, into pens properly equipped therefor. The statutes of the United States make it the duty of the railroad company to do that. You have heard all the evidence in the case, and it is for you and you alone to determine

whether or not the corrals and pens provided by the defendant company at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding and resting and watering of cattle. I say for the proper unloading, feeding, and resting and watering of the cattle. In passing upon this question, you may take into consideration the season when the cattle arrived at Yuma, the climatic conditions thereat at the time, and all of the other facts and circumstances in the case. In this same connection, you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its usual schedule could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered, and rested under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line (147-71) of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma, under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading.

"If you find that the corrals or stock pens of the defendant company at Yuma were 'properly equipped for the unloading of cattle for feed, water and rest,' and that said company used due diligence in the unloading, handling and care of the stock at Yuma, then the defendant would not be liable to the plaintiff for any loss or injury to any of the said cattle."

REPLY TO ARGUMENT NUMBERED TENTH, EMBRACING THE FOURTEENTH AND TWENTY-FIFTH ASSIGNMENTS OF ERROR

These assignments and the arguments made by counsel in support thereof, to our minds present the most difficult questions for the Court's analysis and determination.

FOURTEENTH ASSIGNMENT

We will first consider in this reply the fourteenth assignment of error, based upon the Court's refusal to give the special instruction therein requested by the plaintiff in error. The instruction asks that:

> "The amount to be claimed by plaintiff for each of said animals so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of shipment, to-wit: On July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value thereof, to-wit: the sum of $30.00 per head."

and further asks that the value of injured cattle

> "be adjusted on a basis of said declared and agreed valuation of $30.00 per head and the freight charges on the same from San Luis Obispo, California, to Phoenix, Arizona, **and that if said animals after delivery at said destination to plaintiff were of the value of $30.00 per head, and the freight charges on the same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for said animals alleged to have been injured.**"

The first portion above quoted of the requested instruction would foreclose the defendant in error of the

right to establish the actual value of his stock shipped, in their normal condition, and would further render it futile and vain for defendant in error to show the actual value of any of his cattle in their damaged condition, provided that their actual value in such condition equalled or exceeded the sum of $30.00 per head. It asks that the released valuation as named in the shipping contract, be accepted by the jury as the actual value of the cattle in question, notwithstanding the fact that the contract itself provides that the company shall be liable for loss or damage up to the declared value of $30.00.

The latter quoted portion of the instruction would grant to the carrier entire immunity for any loss, damage or injury arising through its own negligence, no matter how valuable the animal injured or to what extent damaged, provided the animal still had an actual value of $30.00 after injury. The Supreme Court of Indiana very neatly and tersely answers this portion of the requested instruction in the following language:

> "The law will not allow a common carrier to contract to be safely negligent." Rosenfeld vs. R. R. 2 N. E. 364.

What we believe to be a proper construction of the clause of the shipping contract upon which these errors are assigned, is well and logically expressed by the Supreme Court of Tennessee as follows:

> "The question is not, what did each animal bring in the market in its injured condition, but rather to what extent and in what amount not above $100.00 (the declared value) was it damaged through the fault of the defendant? Not

what value was left in the animal, but what elements of value were wrongfully taken away?"

Starns vs. Louisville & N. R. Co., 19 S. W. 675.

The Supreme Court of Massachusetts in Brown vs. Cunard Steamship Co., 16 N. E. 717, 719, uses the following language in construing a similar clause in a shipping contract:

> "In the former case we do not suppose that it would be contended that if a package brought 100 pounds no damage could be recovered, yet unless the argument is carried to that extent we see no reason why, in the latter alternative, the ship owner should escape if the goods bring their invoice price. Looking at the words of the latter branch of the sentence alone, it will be seen that they refer 'to the event of damage for which the shipper is responsible', and therefore in terms presuppose that something is to be recovered in the case for which they provide. The followng words 'the liability shall not exceed' etc., are apt words to express the outside limit of the sum to be recovered, but both the particular words and the whole structure of the sentence **are most inapt to express a stipulation that if the goods are still equal to the invoice value, there shall be no recovery at all.**" (Italics are ours.)

TWENTY-FIFTH ASSIGNMENT

We believe the instruction given by the Court as to the measure of damages for loss and injury to the shipment very clearly and completely states the well supported, logical and equitable rule as between carrier and shipper for the measure of damages under facts similar to those existing in this case.

It is a well established rule that the place of designa-

tion is to be taken as the basis for determining the damage and that the measure of damage is the difference between what the goods were worth at the place of destination, as injured, and what they would have been worth if delivered in good order, not to exceed, of course, the limit of recovery placed in the shipping contract itself.

Estill vs. N. Y. etc. R. Co., 41 Fed. 849
Western Mfg. Co. vs. The Guiding Star, 37 Fed. 641.
The Surrey, 30 Fed. 223.
Hudson vs. Northern Pac. R. Co. 60 N. W. 608.
Gulf etc. R. Co. vs. Butler 63 S. W. 650.

The case of Hart vs. Penn. R. R. Co. 112 U. S. 331 cited by plaintiff in error in support of its views, we believe well sustains the instruction given by the Court and assigned as error numbered Twenty-five. The contract of shipment in this case contained a clause to the effect that the carrier assumed a liability of not to exceed $200.00 per head for each horse or mule shipped. The shipment consisted of five head. One of the horses was killed and others were injured. A recovery in the amount of $1,200.00 for the damage was had in the trial court. The trial court charged the jury as follows:

> "It is competent for a shipper by entering into a written contract to stipulate the value of his property and to limit the amount of his recovery in case it is lost. This is a plain agreement that the recovery cannot exceed the sum of $200.00 each for horses."

This charge of the trial court and the recovery in

the trial court was sustained by the Supreme Court of the United States. The following language from the Supreme Court's opinion is in point:

> "The limitation as to value has no tendency to exempt from liability for negligence . . The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. . . The carrier must respond for negligence up to that amount."

The Supreme Court of Tennessee in Starns vs. Louisville & N. R. Co., supra, following the Hart case, expresses the rule as follows:

> "The court at this point should have told the jury that the stipulation limited the liability of the defendant to $100.00 for each animal injured or killed, and that they should assess the damages according to the real injury caused by the carrier's negligence in no instance exceeding $100.00 per head. The question is not what did each animal bring in the market in its injured condition, but rather to what extent and in what amount not above $100.00 was it damaged through the fault of the defendant? Not what value is left in the animal, but what elements of value were wrongfully taken away? To illustrate: a horse shipped under such a contract loses one eye through the negligence of the carrier, and the owner sues for damages. The question in such a case is how much has the animal been damaged by the loss of the eye, and not will he sell for as much as $100.00 with but one eye. The agreement is that the carrier shall not be liable for more than $100.00 in case of damages, not that no liability shall attach if the horse though injured, should sell for as much as that sum. The true measure of liability under the contract is the

amount of actual damages resulting from the negligence of the carrier in no case to exceed the sum stipulated. This is the most natural and reasonable construction of the contract. It is fair and just to both parties."

The following cases are also closely in point and completely sustain the above instruction given by the trial court in this case:

Brown vs. Cunard S. S. Co. supra.

Nelson vs. Great Northern Ry. Co. 72 Pac. 642, 649.

The general rule on the measure of damages under facts similar to this case is stated in Am. & Eng. Enc. of Law, Vol. 5, p 335, 2nd Ed. as follows:

"Where the stipulation limits the liability of the carrier in any event to a sum named in case of loss of the property shipped and no loss occurs, but the property is injured the shipper is entitled to recover damages for the injury up to the amount named, although the injured property may still be valuable. The effect of the stipulation is not to fix a limit in case of loss and a proportionate limit in case of injury, but to fix an amount which shall be the limit of recovery whether for loss or injury."

RULE URGED BY PLAINTIFF IN ERROR CONSIDERED.

The rule insisted upon by counsel for plaintiff in error as the correct rule, appears to have found support in but two States, viz: Indiana and New York, and in each of the cases cited by counsel, the Supreme Courts of those States were divided in their opinions, two judges dissenting from the majority opinion in

the Indiana case, and one dissenting in the New York case, and announcing the rule as given by the trial court in this cause as the true and proper rule.

Let us now analyze and test the rule and formula as announced in these cases, viz:

> "As the declared value of the injured property is to its actual value, so the amount of recoverable damages is to the amount of the real loss."

and see to what conclusions it will carry us.

The testimony discloses the sound value of defendant in error's cattle to be from $85.00 to $100.00 per head. (Trans. 85, 94, 95, 101.) However, the amount of damage alleged in the complaint is $20.00 per head for injured cattle. The testimony further discloses that the injured cattle had a market value of $65.00 per head. Taking the minimum estimate of the value of the cattle in their normal condition and applying the formula, we have 30:85::x:20. Solving the proportion we find the value of x to be 7.05.

Now let us assume the largest value testified to, then we have the proportion 30:100::x:30. Solving the proportion we find the value of x to be 9.

Now let us assume the actual value of the cattle in their normal condition to be $40.00 per head and their actual value in their injured condition to be $10.00 per head, then we have the following proportion 30:40::x:30. Solving the proportion we find the value of x to be $22.50.

Let us suppose now that the actual value of the shipment is $30.00 per head, being the same as their declared value, and let us suppose that we were

obliged to sell the injured animals at $10.00 per head, and that we are suing for a $20.00 damage as in the present case, our formula would be 30:30::x:20. Solving the proportion we find the value of x to be 20.

We now ask the question does the formula as announced by the Supreme Courts of Indiana and New York afford an equitable or logical rule of interpretation of the contract in question and a proper rule for measurement of damages? Under this formula the defendant in error having shipped animals worth from $85.00 to $100.00 per head, and having suffered actual loss and damage through the negligent acts of the Company of from $20.00 to 35.00 per head, would be enabled to recover from $7.05 per head to $9.00 per head. Had he shipped animals actually worth but $30.00 per head and had he suffered an actual loss and damage to his shipment of $20.00 per head, his recovery would be 100% of his actual loss and damage or $20.00 per head.

Now let us suppose the defendant in error's cattle were actually worth $150.00 per head in their sound condition, and $50.00 per head in their injured condition, and let us keep in mind the construction placed upon the limited livestock shipping contract by the United States Supreme Court in a number of decisions, some of which have been quoted by plaintiff in error, which limits his maximum recovery for loss or damage to $30.00 per head. Under this rule of construction, this is the largest amount he could sue for, no matter what his actual damage might be. Reducing this set of facts to the mathematical formula, we have 30:150::x:30. Solving the proportion we find the value

of x to be 6. In other words, under such a formula, the larger the actual value in its relation to the declared value, the smaller the percentage of actual recovery. It would seem to impose a penalty upon the shipper in the way of a smaller proportionate recovery for his failure to declare the actual market value of his stock in his shipping contract and the payment of the increased rate, and conversely, the smaller the declared value in proportion to the actual value, the more advantageous the contract to the carrier in the event of its negligent injury of the stock in question. We can not believe any Court will knowingly place such interpretation upon a clause of a shipping contract entered into between carrier and shipper as will have the effect either of penalizing the shipper or of unfairly shielding the carrier from consequences of its own negligence. The true rule must be that rule of construction which will most completely and equitably carry out the contract entered into between the parties.

Respectfully Submitted,

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